Court of Appeals, State of Michigan

ORDER

People of MI v Robert Elliott Henshaw

Docket No. 258359

LC No. 03-001490 FC

Bill Schuette
Presiding Judge

Christopher M. Murray

Pat M. Donofrio
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued March 16, 2006 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 0 2 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2006
v	No. 258359 Macomb Circuit Court
ROBERT ELLIOTT HENSHAW, Defendant-Appellant.	LC Nos. 03-001489-FC 03-001490-FC

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant was charged with six counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), in each of two separate lower court files, which were consolidated for trial. Following a jury trial, he was convicted of all 12 counts and sentenced to concurrent prison terms of 285 months to 40 years for each offense. He appeals as of right. We affirm.

I. Underlying Facts

Defendant was convicted of sexually assaulting his former girlfriend's two daughters, AT and HT, ages 14 and 16, at the time of trial. The victims' mother met defendant in 1998. In early 1999, she and the two victims, who were nine and 11 years old, moved into defendant's house. Defendant was immediately very involved in the victims' daily lives. Within a short time, defendant allegedly became the sole ruler and disciplinarian in the home, implemented strict rules, and insisted that the victims call him "Dad," often referring to himself as "God."[1] The victims claimed that defendant began sexually abusing them, often using physical abuse, threats of harm, or the grant or refusal of privileges to garner sexual acts. According to the victims, during the four years that they lived with defendant, he sexually assaulted them from one to several times a week, and the sexual acts primarily included oral sex and sexual intercourse. Additionally, during this time, the relationship between defendant and the victims' mother was tumultuous, and involved domestic violence and excessive alcohol use. On occasion, the victims' mother and the girls briefly moved out of the home because of domestic

[1] Until late 2002, the victims' mother worked full time, five to six days a week, and defendant was generally home with the victims. Defendant drove the victims' mother to work, and also drove the victims to and from school. Defendant began working in 2002.

violence, but returned. In January 2003, after defendant struck AT and dislocated her jaw, the family moved out and did not return. In March 2003, HT reported the alleged sexual abuse to a school liaison officer.

The victims testified that the sexual assaults occurred on numerous occasions, in various ways and locations, including inside defendant's home and "up north." Both girls explained that they could remember specifics of some of the assaults for various reasons, including it being the first time, the location, the pain involved, or it being "worse than other times." Sometimes the assaults would occur with both girls at the same time, sometimes after defendant made them consume alcohol, and sometimes after defendant showed AT pornographic pictures. The girls also testified to violence against them if they refused to engage in the sexual acts, and that defendant would suggest playing "Truth or Dare." Oftentimes defendant would indicate that the sexual acts would get the girls out of trouble, or would allow them privileges.

Both victims testified that in 2001, when they moved out of defendant's house for two weeks, HT disclosed the sexual abuse to their mother, and asked that they not return to defendant's house. The victims' mother testified that, as a result of HT's revelation, she talked to defendant, and he indicated that "he was sorry and wanted to get help." He also allegedly promised not to "do it again." She also told HT "to be good, not to break any of the rules, and . . . to stay away from him." AT testified that after their mother told them that defendant promised that it would not happen again, the matter was never discussed.

The victims explained that they did not disclose the sexual abuse to anyone else because defendant regularly threatened to kill them and their mother if they ever told anyone. Both victims and their mother testified that they were afraid of defendant and believed his threats, explaining that he was often physically violent,[2] and regularly brandished a handgun.[3] AT recalled an incident when she was 12 years old, and defendant pushed her against a heater, causing her to injure her back. She disclosed the incident to school personnel, who reported the incident to a protective services (PS) worker. After the PS worker talked to defendant, he prohibited the victims from using the shower or electricity for two days. Defendant allegedly offered to lift the restrictions if both agreed to have sex with him. HT testified that the PS worker made the situation worse, and "just left."

Defendant testified at trial and denied sexually assaulting the victims, admitting to their mother that he did so, threatening anyone with a gun, or playing "Truth or Dare." He admitted that he had a bad temper, that he and the victims' mother fought frequently, and that he struck AT in January 2003. Three defense witnesses, who were defendant's friends, denied seeing inappropriate behavior between defendant and the victims. The witnesses maintained that, although defendant and the victims' mother fought, defendant treated the victims with respect.

---

[2] The police were called to the house on four occasions. According to AT and her mother, at other times defendant would stop them from calling the police or leaving the house.

[3] The police confiscated a handgun from defendant's home. HT indicated that defendant said he could kill them and get away with it because his gun had no serial numbers.

II. MRE 404(b)

Defendant first claims that he is entitled to a new trial because the trial court improperly admitted "multiple prior bad acts into evidence" in violation of MRE 404(b). We disagree.

Before trial, the prosecution moved to admit evidence of defendant's other crimes or wrongs under MRE 404(b) in order to explain the victims' delay in disclosing the sexual abuse, and to illustrate defendant's common scheme, plan, or system for sexually assaulting them. The trial court granted the prosecution's motion to admit evidence of a 2003 conviction for domestic violence against AT, a 2001 incident involving the victims' mother, as well as other uncharged acts of domestic violence and threats by defendant against the victims and their mother. Defendant now claims that, despite the court's specific ruling pertaining to domestic violence, the prosecutor "was allowed to introduce a virtual avalanche of prior bad acts that were never noticed to the defense." Defendant cites testimony that he threatened the victims and their mother with a gun, denied the victims the use of electricity, made the victims drink alcohol, possessed pornographic magazines, used pornographic screen savers, showed the victims pornographic images, and belonged to a "sex cult" as a teenager.

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Here, however, defendant failed to object to all of the testimony he now challenges on appeal. We review those unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

MRE 404(b)(1) prohibits "[e]vidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice pursuant to MRE 403.[4] *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

A. Threats with a Gun and the Denial of Electricity

We reject defendant's claim that the testimony that he threatened the victims and their mother with a gun, and denied the victims the use of electricity for two days was improper. The evidence was not offered to show defendant's bad character. Rather, it assisted the jury in weighing the victims' credibility, particularly where the defense denied any wrongdoing and

[4] Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

argued that the victims' delayed reporting of the sexual abuse substantiated his assertion of fabrication. The victims testified that they observed defendant threatening their mother with a gun, and that he regularly brandished the weapon. As previously indicated, HT testified that on one occasion when she refused to engage in sexual intercourse with defendant, he threatened her with a gun, and she complied. Further, AT testified that after defendant learned that she reported an incident of physical abuse, defendant was very upset and denied the victims the use of electricity for two days, and HT indicated that things then became "worse." The victims testified that they did not report the sexual abuse earlier because defendant threatened to kill them and their mother and, given his previous actions, they believed the threat was credible.

In sum, the challenged evidence, coupled with defendant's threat to kill the victims and their mother if they disclosed the abuse, was relevant to rebut defendant's theory of fabrication. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996) (evidence of a defendant's prior bad acts was relevant to explain a victim's delay in reporting the alleged abuse). The challenged evidence also supported the prosecutor's theory that defendant had control over the victims, which was relevant to illustrating defendant's common scheme, plan, or system for sexually assaulting them. We therefore conclude that the evidence was relevant to the factual issues in this case.

Furthermore, the evidence was not inadmissible simply because the nature of the evidence was prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. While the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems only from the offensive nature of the crime itself. See *Starr*, *supra* at 499. Consequently, we reject this claim of error.

B. Alcohol Consumption

Defendant did not object to the testimony that he forced the victims to consume alcohol, and it is not plainly apparent that the challenged evidence could not have been received successfully and correctly. See *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Although defendant challenges the admission of the evidence under MRE 404(b), that rule is not implicated where the disputed evidence could have been considered as connected to or part of the crimes charged. Here, AT testified that defendant "used to make [her] drink . . . and told [her] that she would have fun." HT testified that, after defendant gave her and AT alcohol, they "would get really drunk and then it would be easier, I guess." "Evidence of other criminal acts is admissible when so blended or connected with the crime of which [the] defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *Id.* at 742 (citation omitted). We therefore reject this claim of error.

C. Pornographic Material

Next, defendant claims that he is entitled to a new trial because the admission of evidence of "statements" concerning his possession of different pornographic material, his showing and e-

mailing certain pornographic images to the victims, and his leaving pornography in plain view in the house was violative of MRE 404(b). Defendant did not timely object to the challenged statements,[5] and no clear or obvious error is apparent. *Carines*, *supra*.

Defendant's argument regarding MRE 404(b) is misplaced. The use of "other acts" as evidence of character is excluded, except as allowed by MRE 404(b),[6] to avoid the danger of conviction based on a defendant's history of misconduct. *Starr*, *supra*. But MRE 404(b) is not implicated if evidence of "other acts" is logically relevant and does not involve the intermediate inference of character. *VanderVliet*, *supra* at 64. The question is whether the other acts evidence is in any way relevant to a fact in issue other than to show a propensity to commit the crime charged. *Id.*

MRE 404(b) is not implicated under the circumstances of this case because the described acts are not "other acts" within the meaning of MRE 404(b), but are "bad acts" that are directly relevant and admissible under MRE 401. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). In this criminal sexual conduct case, evidence that defendant sent, showed, or exposed the adolescent victims to pornographic material in the home, during the time period that he allegedly sexually abused them, was directly relevant to the charges against defendant. For example, in explaining the first instance of an inappropriate touching, AT explained that defendant called her into his office, showed her pornographic images on his computer, and touched her breasts. In brief, the alleged "other acts" evidence was relevant and admissible under MRE 401, independent of MRE 404(b).

D. Membership in a Sex Cult

We also reject defendant's claim that he was denied a fair trial by the admission of testimony that he was in a "sex cult" as a teenager. During trial, the prosecutor asked the victims' mother, and a jail inmate who shared a common area with defendant, if defendant had told them that he was in a sex cult when he was a teenager. However, defendant did not timely object to the challenged testimony, and, therefore, our review is limited to plain error affecting substantial rights. *Carines*, *supra* at 763. Defendant has the burden of persuasion with respect to prejudice. *Id*. On appeal, apart from mentioning that this evidence was received, defendant does not explain why the testimony was inadmissible or prejudicial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of

[5] During the testimony of a police officer, defendant did object to several pornographic pictorial exhibits that were admitted. But here, defendant challenges only the "statements" made by the victims or their mother.

[6] Under MRE 404(b), other acts evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." MRE 404(b)(1).

supporting authority." *Watson*, *supra* at 587 (citation omitted). Therefore, defendant has not sustained his burden of demonstrating a plain error affecting his substantial rights.

III. Exclusion of Other Evidence

Next, defendant argues that he was denied a fair trial when the trial court precluded the admission of documents that would have illustrated his relationship with the victims, showed AT's state of mind while living in the house, and impeached AT's credibility. We disagree.

During defense counsel's cross-examination of AT, he sought to admit "nice" birthday and father's day cards written by the victims, and a letter written by AT to the Secretary of State to assist defendant in regaining his license. The prosecutor objected, and the court sustained the objection for lack of foundation before requesting that AT identify the documents. Thereafter, defense counsel continued to question AT, who testified that she wrote a letter on defendant's behalf indicating that there was no alcohol consumption in the house, but that defendant wrote it initially and directed her to copy it. She also testified that she made cards for defendant and explained that she made about two in the beginning when things were good, but later gave defendant cards because they were "expected." Defense counsel did not again attempt to admit the documents during AT's testimony.

Subsequently, during defense counsel's direct examination of defendant, he sought to introduce the letter written by AT, and the prosecutor objected. Outside the presence of the jury, the following exchange occurred:

> *The Court*: [Defense counsel] the letter is clearly hearsay. I think I agree that you could have used that to impeach [AT]. What are you using - - for what purpose are you seeking its admission now.
>
> * * *
>
> [*Defense counsel*]: It is being used to describe the circumstances in the house. It's not any different than having the playboy magazines in the house to show, I don't know what.
>
> Also, Your Honor, secondarily, the letter indicates that there is no drinking in the house. That is not for impeachment. It is to show how children learn what they're told to do and why they could be more apt to tell a story now because they understand the system.
>
> *The Court*: It is hearsay. What are you offering it, under what exception or why, on what basis do you seek to admit that? For what purpose[?]
>
> [*Defense counsel*]: For the description of the house, period.
>
> *The Court*: For the description of the house.
>
> [*Defense counsel*]: The description of the living arrangements at the house. He can authenticate the writing, Your Honor. He can say this is [AT's] writing. This is how she describes it.

The Court: It is a hearsay statement . . . . You haven't articulated any exception.

[*Defense counsel*]: Its admission is to indicate the reality of a child on the writing of their environment, the hypocrisy of a child. I believe that is an 803[3] exception, Your Honor.

* * *

Also direct impeachment of her testimony.

The Court: Then you should have used it during your cross of [AT] and then I think it, you could have referenced it.

I'm going to sustain the objection it is hearsay.

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). Under MRE 803(3), a statement of a declarant's "then existing state of mind, emotion, sensation, or physical condition" is not excluded by the hearsay rule. *People v Coy (After Remand)*, 258 Mich App 1, 14; 669 NW2d 831 (2003). We agree with the trial court that defendant failed to demonstrate that the proposed evidence fell within MRE 803, and he failed to articulate any other ground for admission of the proposed evidence.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. A defendant's constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute, *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), as the accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes, supra*.

The trial court's ruling was not a blanket exclusion of all evidence regarding the existence of the writings, and did not otherwise limit defendant's opportunity to present a defense. Although the court precluded the proposed exhibits, it allowed the victims and defendant to testify about the existence and content of the letter and cards. Additionally, although AT testified that there was excessive alcohol consumption in the home, she admitted that she wrote in the letter that defendant did not drink alcohol. Thus, the jury was aware of AT's inconsistent statements. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Therefore, the trial court did not abuse its discretion by excluding the challenged evidence.

IV. Destruction of Evidence

Next, defendant claims that he is entitled to a new trial as a result of the police destroying "potentially exculpatory" evidence. We disagree.

When searching defendant's home, the police confiscated a plastic jar that contained slips of paper with sexual innuendoes written on them. It was later discovered that the jar belonged to HT, and she used it to play "Truth or Dare" with her friends. On July 7, 2004, the first day of trial, defendant requested production of the jar. On July 9, 2004, the jar had not yet been produced because the property room officer could not locate it. The trial court noted that defendant's request was untimely, but ordered that the police produce the jar immediately. Shortly thereafter, a police detective advised the court that the property officer had mistakenly discarded the jar based on miscommunication. Thereafter, the following exchange occurred:

> [*Defense counsel*]: Your Honor, just so we are all on the same page. I will be asking [the detective] about the jar. I believe that he can describe the jar and the papers inside the jar to the best of his recollection. In fact, we talked about this on Wednesday.
>
> *The Court*: That is fine.
>
> [*Defense counsel*]: So we all understand.
>
> * * *
>
> Maybe ask him why we no longer have it. He can explain it's been thrown away, something like that.
>
> *The Court*: That is fine.

Defendant did not request any further action by the trial court. As defense counsel proposed, during cross-examination, he asked the police detective about the jar. The detective testified that the police confiscated a jar from defendant's home, that the jar belonged to HT, and that the jar contained slips of paper with a sexual innuendo written on each slip. Given defense counsel's decision of how to handle the matter, defendant cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Accordingly, any objection in this regard was waived, and there is no error to review. *Id.* at 214-216.

We nonetheless note that "[f]ailure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993) (citation omitted). Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Here, defendant provides no evidence that the police acted in bad faith. Additionally, he has not demonstrated that the evidence was exculpatory, or explained how the physical evidence would have further aided his defense apart from the testimony describing the evidence. Consequently, this claim is without merit.

V. Prosecutorial Misconduct

Defendant also argues that he is entitled to a new trial because the prosecutor impermissibly argued facts not in evidence, vouched for the victims' mother's credibility, and denigrated the defense. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant failed to object to some of the prosecutor's conduct below. We review those unpreserved claims for plain error affecting substantial rights. *Carines*, *supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Arguing Facts Not in Evidence

Defendant first claims that the prosecutor argued facts not in evidence when making the following comments during rebuttal argument:

> [The victims' mother], I don't know if you're familiar with domestic violence, people who repeat relationships in the same behavior. They select the same men over and over and over again . . . That is a very difficult syndrome to break.
>
> [The victims' mother] is not on trial here. She went through what she needed to go thorough to get her children back . . . We all may disagree on how she handled things, however, domestic violence syndrome is a very, very strong emotional thing. It is dysfunctional, absolutely. There's no question about it. It is a very dysfunctional situation to be in. Unfortunately, they [sic] repeat of the behavior and continue in the cycle and they go back. I promise I won't do it anymore. I love you. All the things she heard every time she went back.
>
> * * *
>
> I deal with these cases everyday. Sexual assault cases on children. Unfortunately, this happened. Number one, it happens to most, in mostly dysfunctional families. Unfortunately.
>
> * * *
>
> Now, is that why she went back. She went back because of the domestic violence syndrome.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Although plaintiff asserts that the prosecutor's remark was responsive to defense counsel's argument that the victims were not credible because they were from a dysfunctional family, there was no evidence to support an inference that the victims' mother returned to live with defendant "because of

domestic violence syndrome." But defendant did not object to the remark and, therefore, our review is limited to plain error affecting substantial rights. *Carines*, *supra*.

Viewed in the context of the complete closing and rebuttal arguments, the prosecutor's remark did not affect defendant's substantial rights. The remark involved only a brief portion of the prosecutor's arguments, was of comparatively minor importance considering the totality of the evidence against defendant, and was not so inflammatory that defendant was prejudiced. Moreover, any prejudice that may have resulted could have been cured by a timely instruction. *Schutte*, *supra* at 721. Indeed, the trial court instructed the jurors that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant contends that the prosecutor continued to make improper remarks when she stated the following in rebuttal argument:

> So it was January, December 2002/2003, the last incidents that they could recall. The report was made in March. There is a three-month time delay. The basic protocol is not to send them to a doctor and have evaluations performed. There is going to be no forensic evidence. It is gone within a short period of time.
>
> * * *
>
> In the majority of cases you will ever hear 90 percent of it is testimony of the evidence you will here and assess. Yes, there is physical evidence and DNA and things like that which you will have evidence to see some of the physical evidence we have. The evidence comes from witnesses' testimony in 90 percent of the time in all cases.

Viewed in context, these remarks were focused on refuting defense counsel's closing argument.[7] Specifically, defense counsel asserted that the jury should not convict defendant because there was no medical evidence, and also stated:

> Evidence to me is the testimony of young girls, witnesses, but things that mean a lot to me are dates, telephone records, DNA, markings, medical reports, those types of things I can't cross-examine. The least effective . . . are witnesses . . . . they are all over the place.

Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, immediately after making the last challenged remark, the prosecutor stated that she "has a duty to prove the case beyond a reasonable doubt," and urged the jury to evaluate the evidence presented during trial. Moreover, the trial court's instructions that the lawyers' comments and

[7] In overruling defense counsel's objection, the trial court noted that defense counsel referenced the issue in closing argument.

arguments are not evidence, and that the case should be decided on the basis of the evidence, were sufficient to dispel any possible prejudice. *Long*, *supra*. Accordingly, this claim does not warrant reversal.

B. Vouching

Defendant also contends that the prosecutor impermissibly vouched for the credibility of the victims' mother when she made the following emphasized remarks in closing argument:

> You heard the testimony from [the victims' mother]. I'm sure we all have our opinion as to what type of mother she is. Okay. She obviously made some mistakes. She testified. *She testified honestly.* She testified about the mistakes that she made. I don't believe she is very proud of those. *I'm sure she testified to everything accurately.* Okay. Even the ones that, even the things that obviously are socially unaccepted things. She did, she did testify, tell you what she did right or wrong. Whether you believe it's right or wrong, she testified to it.

Defendant did not object to the prosecutor's argument, and defendant has not demonstrated plain error affecting his substantial rights. *Carines*, *supra*. A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). To the extent the prosecutor's remarks could be considered improper, they involved only a brief portion of the argument, and were not so inflammatory that defendant was prejudiced. Additionally, before and after the challenged remarks, the prosecutor discussed the evidence at length. Moreover, the trial court's instruction that the jurors were the sole judges of the witnesses' credibility was sufficient to dispel any perceived prejudice. *Long*, *supra*. Accordingly, this claim does not warrant reversal.

C. Denigrated the Defense and Defense Counsel

Defendant also claims that, during rebuttal argument, the prosecutor denigrated the defense and defense counsel by referring to the defense as "red herrings," thereby suggesting that the defense was "trying to trick [the jury] into acquitting [defendant]."

A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Considering the context of the challenged remarks, which were made during rebuttal argument, drew no objection, and were made during a vigorous adversarial proceeding, they did not amount to an improper personal attack on defense counsel, or improperly shift the jury's focus from the evidence to defense counsel's personality. Viewed in context, the prosecutor's remarks conveyed her contention that, based on the evidence, any defense was a pretense and irrelevant, and ignored the evidence. In making the challenged remarks, the prosecutor discussed what she considered to be "red herrings," urged the jurors to evaluate the evidence, and consider

that, in light of the evidence, defendant was guilty. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to her theory of the case, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *Ullah*, *supra* at 678.

VI. *Blakely v Washington*

We reject defendant's claim that he must be resentenced because the trial court's factual findings supporting his scoring of the sentencing guidelines offense variables were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has stated that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

VII. Cumulative Error

We also reject defendant's final argument that the cumulative effect of several errors at trial deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio